IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF ANTHONY WONG
AGAINST OTTAWA BOARD OF EDUCATION AND A. WOTHERSPOON

INTERIM DECISION
(Motion to Amend Complaint by Adding
Discrimination on the Basis of Age as a Ground)

INTRODUCTION

On September 29, 1993, as the result of certain responses made by two of its witnesses, the Commission moved to add discrimination on the basis of "age" as a ground of this complaint. In order to provide adequate time for counsel to argue the merits of this motion without the loss of time set aside for the hearing of evidence it was agreed that written arguments should be exchanged prior to the October 18, 1993, date scheduled for the resumption of the hearing. After carefully considering the arguments of counsel I have decided to allow the motion to so amend the complaint for the reasons that follow.

REASONS

As pointed out in an earlier interim decision in respect of a motion in this very matter to amend the complaint by adding a reference therein to s.11 of the ***Human Rights Code***, R.S.O. 1990, c. H-19 (the "***Code***"), the cases of ***Cousens v. Canadian Nurses Association*** (1981), 2 C.H.R.R. D/355 and ***Tabar and Lee v. Scott and West End Construction Ltd.*** (1982), 3 C.H.R.R. D/1073, *inter alia*, make it clear that a board of inquiry has the jurisdiction to amend a complaint under the ***Code*** by adding a ground to the complaint after the hearing has commenced, provided that the principles of natural justice are respected. As was said in ***Renaud***

v. School District No. 23 (Central Okanagan) (1987), 8 C.H.R.R. D/4255 (at para. 33440), this requires:

> ... that a respondent is not caught by surprise, has sufficient notice to prepare his case and interview the relevant witnesses, and is able to examine and cross-examine witnesses on the relevant issues or seek adjournment for further preparation where appropriate. Finally, it appears that any perceived disadvantage or prejudice to a respondent is to be weighed against the purpose of human rights legislation and provision of relief for the effects of unlawful discrimination against a complainant.

In ***Renaud*** the board amended the complaint of its own motion in the course of preparing its decision and, after making the above observation, went on to conclude that the complaint therein should be amended because (a) the amendment would be based on the same incidents already complained of and "hence the particulars of the allegations are identical and the [respondent] is not caught by surprise"; (b) the ability to examine and cross-examine witnesses and to call further witnesses was not impaired; and, (c) and the time available for preparation was sufficient.

In my view, these three "factors" cannot be regarded as compulsory criteria, but are nothing more than helpful indicia -- particularly in a case such as ***Renaud*** in which the board amended the complaint on its own initiative *after* the hearing. In any event, the Commission submits that these factors are satisfied in the present case in that: the allegation of age as a ground of discrimination would be based on the same incidents already complained of pursuant to s.4(1) of the ***Code***; the respondents' ability to examine witnesses regarding this additional ground would not be impaired since the Commission is prepared to recall any witnesses already examined, and the respondents are free to call such further witnesses as they deem appropriate in this regard; and, as the dates agreed upon for hearing the evidence of the respondents lie four months ahead, the respondents have sufficient time to prepare with respect to the additional ground sought to be added to the complaint.

The general relevance of ***Renaud*** was impugned by counsel for the respondents on the basis that the chairman in that case "found that his amendment was an amendment to the "form" and not to the "substance" of the complaint [whereas] the amendment sought by the Commission

in this case is clearly an amendment to the substance of the Complaint and has nothing to do with the form of the Complaint whatever." As the chairman in the ***Renaud*** case acted on his own motion after the hearing was over it is understandable that he may have found additional comfort in the fact that the amendment there in question went to form rather than to substance. However, I do not think that that was the real gist of his decision; nor do I find as a pre-requisite to the granting of amendments generally that they must go only to form and never to substance. The ***Cousens*** and ***Tabar*** cases, amongst others, make it clear that it is its duty to hear and decide the complaint before it in terms of substance rather than of mere form that permits a board of inquiry to amend a complaint precisely in order to add a substantively new, and not merely formally different, ground. As chairman Ratushney said in *Cousens*, *supra*:

> [at para. 3255] ... the board is required not merely to decide upon the specific ground of discrimination which has been alleged, ***but to hear the circumstances of the complaint*** as presented by the parties and ***decide whether or not any party has*** [in any way] ***"contravened this Act."*** ... [and at para. 3260] It is clearly in the interests of all of the parties and the citizens of Ontario that the ***substantial*** complaint be dealt with at one hearing taking into account ***all of the possible ways*** in which any party may have "contravened this Act." [Emphasis added.]

It was also submitted by the respondents that the "factors" referred to in ***Renaud*** are not satisfied in the circumstances of the present case. In that regard it was argued, firstly, that:

> ... it is not at all clear that the Commission's motion is to amend the complaint to add age as a ground of discrimination solely as it relates to Mr. Wong or whether the broader issue of the [respondents'] surplus policy as a whole is being challenged. In either case the relevant particulars and evidence is significantly different when one looks at "age" rather then "race."

To begin with, the complaint before me is not at large. It is the complaint of Anthony Wong. The motion is to add to ***his*** complaint the allegation that ***he*** was discriminated against on the basis of age. If the amendment were allowed then, in order to succeed on this additional ground, it would have to be shown that Mr. Wong was discriminated against because of age. While "age" and "race" are clearly different, the complaint is that for grounds prohibited by the *Code* Mr. Wong was declared surplus to the needs of Ottawa Technical High School. The "incidents" surrounding his having been declared surplus ("the circumstances of the complaint,"

as Professor Ratushney put it) which must be established through appropriate evidence will remain substantially unchanged regardless of the grounds alleged to have motivated that decision. In any event, I do not think that a motion to add a ground to a complaint must be refused simply because "the particulars of the allegations are [not] identical." Neither ***Cousens*** nor ***Tabar*** suggests any such restriction to the jurisdiction and duty of a board of inquiry to amend a complaint prior to the termination of the hearing. Rather, the only limitation they appear to suggest was stated this way by Professor Cummings in ***Tabar*** (at para. 9546):

> I emphasize, as did Chairman Ratushney, that the jurisdiction to modify the alleged grounds of discrimination carries with it the obligation of providing adequate notice and where appropriate, the opportunity to adjourn for further preparation.

With respect to what the respondents referred to as the "second criterion" in the ***Renaud*** case, it was further argued on their behalf that:

> ... while counsel for the Commission has indicated that it would recall the witnesses to be cross-examined on all relevant issues, that is substantially different from the circumstance in the ***Renaud*** case where because the particulars were identical, the Chairman could conclude that there would be no different examination or cross-examination of the witnesses heard because the particulars of the allegations were identical.

With respect, what the chairman in ***Renaud*** seems to me to be saying is that a respondent's ability to examine and cross-examine witnesses should not be prejudiced by any amendment to the complaint, and that where the particulars are completely identical that ability is not impaired ***even though the hearing has ended***. He does not seem to me to have made the virtually self-contradictory suggestion that these respondents appear to attribute to him, ***viz.***, that it is only where there would be no need to examine or cross-examine witnesses with respect to the added ground that the ability to do so is not prejudiced. In the present case the respondents are assured of ample opportunity to cross-examine the Commission's witnesses, including any whom they wish to have recalled with respect to this added ground of the complaint, and to call all the witnesses they wish in that regard.

As to the third "factor" referred to in ***Renaud***, the respondents suggest that it is only

where the particulars of the additional ground are identical to those of the original ground that no prejudice with regard to preparation time will occur. And, in stating that "the particular of 'age' has never been raised by the Complainant or by the Commission prior to the Commission's motion," they seem to me to confuse through wrongly identifying them the ground or claim (discrimination on the basis of age) with the particulars or details of that ground or claim (such as the declaration of the complainant as surplus to the needs of the school, by whom, when and with what effect, *etc.*). In any event, all that fairness requires is adequate time with which to prepare to deal with the additional ground.

The Commission's evidence-in-chief is expected to be completed on the 18th and 19th of October, 1993, and the respondents' evidence will not be heard until February 21, 1994. The issue involved in respect of the ground of age does not appear particularly complicated. It arose because of the testimony of two witnesses who seemed to suggest that age might have been a factor in the respondents' identification of surplus teachers. Although I have not received the transcript of that evidence, the respondents' quotations from it indicate that the exchanges in question involved six short questions and answers in respect of one witness and three in respect of the other. The Commission indicated that one other witness might be questioned regarding that issue as well (which, of course, does not foreclose the possibility of others testifying with regard to that issue). It seems unlikely that the preparation required to cross-examine these witnesses will be particularly onerous and, since the respondents will be free to have them and any other Commission witnesses recalled four months hence if necessary, I am satisfied that there will be adequate preparation time with respect to this additional ground.

The respondents suggest that "the time to prepare must be considered to be the period of time prior to the continuation of the hearing, whether that be to the Respondents' case or the Commission's case." However, given the delays already encountered in this case, I am not prepared to adjourn the hearing immediately and lose the time scheduled to hear evidence regarding other aspects of the case simply to provide time "to prepare"for the cross-examination of the Commission's remaining witnesses scheduled to be heard on the 18th and 19th of October with respect to this new ground. The respondents have known since September 29 of the possibility that this motion might succeed, and the issue does not appear so complicated as to

require further substantial time to conduct investigations and to consider what questions to put in cross-examination to witnesses who suggest that age was a factor in the respondents' decisions regarding the declaring of teachers to be surplus. In any case, should such time prove necessary it can be provided through the device of recalling witnesses when the hearing resumes in February of 1994.

The unreported decision in ***Bremer v. Board of School Trustees, School District No. 62*** , cited by the Commission in support of this motion, seems particularly apposite. In that case, as in this, it was not until the evidence of two witnesses was heard that the possibility that age was a factor in the respondent's allegedly unlawfully discriminatory decision surfaced. In denying the submission that it would be exceeding its jurisdiction if it permitted the complaint to be amended to include age as a ground the board stated (at page 33) that:

> ... it is apparent at the outset that such a restriction is entirely inconsistent with the principles upon which the onus may shift to the respondent in human rights proceedings. To confine a complaint in this manner would be to place upon the complainant the burden of establishing the cause for the impugned conduct, the very burden from which the complainant is relieved by establishing a prima facie case. Second, if complaints under the Code could be narrowed in this fashion, the result would be that an allegation of race discrimination could be successfully defended by proof that it was in reality sex discrimination.

A motion to add a ground was denied in ***Energy & Chemical Workers, Local 916 v. Atomic Energy of Canada Ltd.*** (1984), 5 C.H.R.R. D/2066, because delays that would not otherwise be encountered would have ensued from doing so and the commission had had sufficient information and time to make the amendment prior to the hearing. That is not the situation in the present case where, firstly, the possibility of age as a ground did not arise until the evidence of the witnesses in question was heard and, secondly, no delay attributable to allowing the motion will be occasioned since an adjournment of four months between hearing the Commission's evidence and that of the respondents has already been scheduled.

The respondents suggest that the Commission had sufficient information prior to the hearing on which to claim age as an additional ground in that it knew that "in many instances the more senior teacher was the person declared surplus." However, the matter of seniority was present to the Commission's mind only in that the complainant was of the view that seniority

should have worked in his favour, whereas it was the stated policy of the respondents that seniority was not the major criterion to be used in determining which teachers were to be declared surplus to a school. Not only is discrimination on the basis of seniority outside the scope of the ***Code***, but there was nothing prior to September 29, 1993, to suggest that seniority and age might be a ***negative*** factor. Although, as the respondents contend, it may well be that more often than not one who has seniority over another is also older than that other, it does not follow that the Commission "had ample opportunity to explore this issue and to marshall its evidence" prior to the hearing. I find that it was not until the evidence at the hearing of two of its witnesses that the Commission was alerted to the possibility that age might have been a factor in the impugned decision of the respondents, and that the Commission raised the possibility of this additional ground in as timely a way as possible in the circumstances.

It is also submitted on behalf of the respondents that "at a minimum the moving party must establish that there is some evidence on which a board of inquiry could rule that the complainant was discriminated against on the new ground alleged [and here] there is no such evidence." I find curious the juxtaposition of the respondents' strong objections to any evidence being heard regarding age and their submission that the motion to amend is to be rejected for want of the very evidence they seek to exclude. It is not altogether clear whether it is being suggested that evidence with respect to a newly alleged ground should be heard before ruling on the motion to add it to the complaint, or whether it is being suggested that a new ground can never be added to a complaint because to do so would require that which (*ex hypothesi*) is impermissible, namely, the hearing of evidence in that regard prior to an amendment. Be that as it may, as the Commission points out in reply that: "The respondents have clearly indicated in their submissions to this motion that there is evidence on which a board could conclude that age was a possible ground of discrimination." The transcript as quoted by the respondents, and my own notes in that regard, clearly raise the possibility -- but only the possibility -- that age might have been a factor in the decision complained of. Where during the course of a hearing evidence emerges of possible unlawful discrimination in addition to or instead of that alleged in the complaint, a refusal to add such discrimination as a ground would be anomalous unless clearly required as a matter of procedural fairness. I share the view of the board in ***Bremer*** that

such a refusal would risk the conversion of one form of unlawful discrimination into a defence against another. In my opinion, provided that procedural fairness is maintained, it would be wrong to deny this motion; and I am satisfied that procedural fairness in this case is not at risk by allowing it.

DECISION

For the reasons I have stated, the Commission's motion to amend the complaint so as to include discrimination on the basis of age is hereby allowed.

Dated this 18th day of October, 1993,

H.A. Hubbard,
Chairperson